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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH HATHORNE NUCCIO, Defendant and Appellant.	C058865 (Super. Ct. No. SF101949A)

A jury convicted defendant Joseph Hathorne Nuccio of first degree murder and found he used a knife to commit the murder, and the trial court found defendant had served a prior prison term. (Pen. Code, §§ 187, 667.5, subd. (b), 12022, subd. (b)(1).) The trial court sentenced defendant to state prison for 27 years to life and defendant timely filed this appeal.

Defendant contends the prosecutor improperly failed to assist him in securing the presence at trial of a person defendant blamed for the murder, and the trial court improperly found the prior prison term allegation to be true. We agree with the latter claim, but otherwise shall affirm the judgment.

FACTUAL BACKGROUND

This was a "cold hit" DNA case. On October 11, 2006, defendant was charged with killing Jody Lynn Zunino on September 26, 2001. She was a prostitute who had been picked up by a customer in the Wilson Way area of Stockton, and whose body was found in a nearby field.

An eyewitness saw the victim on Wilson Way that night, talking to a man who looked like defendant.

Three witnesses testified the victim did not like to perform or would refuse to perform anal sex. Because her anus had a slight injury, and defendant's semen was found inside her rectum, this tended to show defendant forced himself upon her.

The victim's body was found nearly nude in a field, with tire tread marks nearby and across her arm and leg, and with a knife she had borrowed from a friend that night next to her. Her throat had been cut and her body bore other slashing injuries.

An eyewitness saw the victim get into a vehicle she described as a white *Bronco* with tinted windows, but she was not familiar with vehicles and identified photographs of defendant's white Chevrolet *Blazer*, which the witness referred to at trial as a "Bronco." She had previously told an officer that a photograph of a Bronco the officer had printed off the Internet "looked similar" to the vehicle she had seen, and the photographs in evidence of defendant's Blazer and the Bronco

from the Internet show that the vehicles are similar to each other.

The day after the murder, a peace officer saw a Ford Bronco in the Wilson Way area, and it was registered to Terry Sprinkle, a parolee. Sprinkle's house and Bronco were searched, but nothing was found.

A criminalist testified defendant's Blazer had tire treads *consistent* with the tread marks found near and on the victim's body, but the tread was not *unique*, that is, she could not testify defendant's Blazer, to the exclusion of other similar vehicles with similar tires, made the tread marks at the scene. Terry Sprinkle's Bronco could not have made those tread marks.

Defendant did not testify, but in argument challenged the drug-using percipient witnesses, challenged the expertise of the tire-tread analyst, and pressed the theory that a desperate, heroin-addicted prostitute might not be choosy about what type of services to perform; therefore, while defendant may have had anal sex with the victim, there was a reasonable doubt whether he killed her.

The jury convicted defendant of first degree murder and found the deadly weapon (knife) enhancement true.

A new trial motion based on newly discovered evidence included the declaration of the victim's former boyfriend, who claimed they regularly had anal sex, and the declaration of a prostitute who claimed the victim admitted having anal sex.

After hearing testimony from these witnesses, each of whom had abused drugs and had convictions reflecting moral turpitude, the trial court denied the motion for a new trial.

DISCUSSION

I. Alleged Prosecutorial Interference

Defendant contends the prosecutor deliberately refused to assist him in securing Terry Sprinkle's presence at trial, causing the loss of exculpatory evidence. We reject this contention of error.

The general rules about prosecutorial interference with defense witnesses are as follows:

"In order to establish a violation of his constitutional compulsory-process right, a defendant must demonstrate misconduct. To do so, he is not required to show that the governmental agent involved acted in bad faith or with improper motives. [Citations.] Rather, he need show only that the agent engaged in activity that was wholly unnecessary to the proper performance of his duties and of such a character as 'to transform [a defense witness] from a willing witness to one who would refuse to testify . . . .' [Citations.]

"To establish a violation, the defendant must also demonstrate interference, i.e., a causal link between the misconduct and his inability to present witnesses on his own behalf. To do so, he is not required to prove that the conduct under challenge was the 'direct or exclusive' cause.

[Citations.] Rather, he need only show that the conduct was a substantial cause. [Citations.] The misconduct in question may be deemed a substantial cause when, for example, it carries significant coercive force [citation] and is soon followed by the witness's refusal to testify [citation].

"Finally, the defendant must also demonstrate 'materiality.' To carry his burden under federal law, 'he must at least make some plausible showing of how [the] testimony [of the witness] would have been both material and favorable to his defense.' [Citation.] Under California law he must show at least a reasonable possibility that the witness could have given testimony that would have been both material and favorable." (*In re Martin* (1987) 44 Cal.3d 1, 31-32; see *People v. Schroeder* (1991) 227 Cal.App.3d 784, 787-788.)

As we explain, the record does not support the claim that the prosecutor deliberately refused to help secure Sprinkle's presence at trial or interfered with defense counsel's efforts. So far as this record shows, the prosecutor did everything he was supposed to do. Further, defendant cannot show causation or materiality: Sprinkle adamantly did not want to testify, and his presence at trial would not have changed the result.

Defendant had made discovery requests regarding Sprinkle, who, as indicated above, had been investigated shortly after the murder. On September 7, 2007, shortly before trial was then scheduled to begin, defendant moved to compel discovery regarding Sprinkle's criminal record.

On September 20, 2007, Sprinkle and his wife failed to appear in response to defense subpoenas, and the trial court (Vlavianos, J.) issued bench warrants for $2,500 for each of them.

When the People disclosed that Sprinkle had several theft-related priors, defendant pressed for records of those cases, as well as other incidents.

On October 5, 2007, defendant again moved to compel discovery about Sprinkle's criminal record. Also that day, defendant moved to be allowed to introduce third party culpability evidence, making the following offer of proof: The day after the murder, an unknown man told a detective that the victim was last seen getting into a white Ford Bronco, and handed the detective a paper with the license plate number "4PMZ262." That day a police officer saw a "tall white male, balding on top," driving that Bronco, and it was found to be registered to Sprinkle. Sprinkle, a parolee, was arrested in Calaveras County the next day, while driving that Bronco. Sprinkle told the police that he had not been to Stockton for several months, but when told he had been seen there the day before by an officer, admitted he had lied. He admitted visiting prostitutes in the Wilson Way area, and stated he had been accused of raping a prostitute about a year before. When the police showed him a picture of the victim, he denied knowing her, even after being told that he and the victim had gone to Lodi High School together. Later, Sprinkle admitted he knew the

victim in high school. Sprinkle has convictions for drugs and violence, is large, physically fit and trained in martial arts, and has been to prison. He once threatened to cut his wife's throat with a knife. The tire tread marks found near the body were similar to those made by Sprinkle's Bronco.

The People opposed the motion, providing details that tended to weaken the offer of proof regarding Sprinkle, including the fact that Sprinkle had an alibi, no incriminating evidence was found in his Bronco, and the tire treads at the scene did not match his Bronco.

At a hearing on February 6, 2008, when the trial court asked who had last spoken to Sprinkle, defense counsel stated "We have served him with a subpoena and he said, you will never get me in court. I'm going to take my wife and we are going to go to North Dakota, and she is not going to testify and I'm not going to testify." Nothing in the record suggests Sprinkle ever changed his avowed intention to avoid this trial.

The trial court observed that it had issued the warrant to search Sprinkle's house and truck back in 2001, and that the return showed no evidence was found, weakening the claim of third party culpability. Eventually the trial court ruled that Sprinkle could be asked about his Bronco and some statements he made, specifically, that if the police found blood in his Bronco, it was from drug-using prostitutes and that he had slapped a prostitute, but to get those statements in, "Sprinkle is going to have to be here."

At that point, defense counsel asked "What are we [going] to do about getting the guy here?" The prosecutor stated "That's not my problem" and the trial court stated "That's not my--I don't go subpoena witnesses." The trial court asked defense counsel if the Sprinkles still lived in the foothills, and he said, "No, they live in San Jose and she works down in San Jose. We have all that information." The prosecutor said, "we can notify [the San Jose Police Department] that there is a bench warrant out for their arrest. I think we can do that." And the court said "Okay."

The issue was revisited towards the end of trial, in several discussions that took place in between testimony.

At the morning break on February 27, 2008, defense counsel noted that the People were almost done with their case, and asked "what progress has been made" regarding the warrants. The trial court asked if the prosecutor had heard anything and the prosecutor said: "I have not heard anything, that would be the San Jose Police Department. Further, they have not been subpoenaed for this trial, this trial has been reset many, many times, there was a reset I believe in January or December that that was issued. I believe they're still in their homes, I think that the Defense should actually go down there and subpoena them to Court and see if they'll come now."

Appellate counsel interprets this passage to mean that the prosecutor never contacted the San Jose authorities. We do not read the passage that way. The prosecutor represented to the

court that he would contact the San Jose authorities and, in this passage, in response to a question by the court, states he had not heard anything back. Absent any information in the record to the contrary, we do not infer that the prosecutor failed to do what he said he would do, or that he made a misrepresentation to the court. The fact the prosecutor *also* argued that the defense had not been diligent does not mean that he did not do his own part.

Defense counsel argued he had no obligation to re-subpoena witnesses once bench warrants had been issued and, addressing the court, asserted, "you told him to tell law enforcement to go pick the guy up." The following then took place:

"THE COURT: He said he contacted San Jose, he said that a couple weeks ago.

"[DEFENSE ATTORNEY]: Right. And so what progress have they made?

"[PROSECUTOR]: It's out of our jurisdiction, we cannot make another agency in another county go do something. I don't know where he thinks that we have this power, it's not this big conspiracy that all law enforcement is connected like that."

The prosecutor then again argued the defense had not been diligent in trying to contact the Sprinkles. Again, appellate counsel infers this means the prosecutor did nothing. Again, the record does not support the claim. Although the prosecutor was of the view that the issuance of the bench warrants did not

relieve the defense of the obligation to re-subpoena or otherwise contact the Sprinkles when the trial date was continued, his comments do not mean he did not contact the San Jose Police Department about the warrants, as he represented that he had done.

The trial court asked defense counsel, "What can they do besides notify the police agency?" Defense counsel at first suggested that he wanted a record to be made of what, exactly, the prosecution had done. This was in aid of his theory that if Sprinkle were unavailable, the statements he had made to the police--statements that the trial court had already ruled were largely *inadmissible*--would become admissible. The trial court trailed the issue in order to call the jury back and continue with another witness.

At the lunch break, defense counsel stated that if the trial court found Sprinkle unavailable, "we need to talk about some of the statements that were made [by Sprinkle], and what my theories are" of their admissibility. He argued that the fact bench warrants had been issued showed the defense had been diligent. He reiterated that when his investigator had finally served Sprinkle with the subpoena, Sprinkle had said "that he was going to take his wife to North Dakota and we would never get him into court." Because a bench warrant then issued, "If we can't get him in then I think we need to determine that he's unavailable and then consider what statements should be able to come in."

At the afternoon break, the trial court noted that the warrants were not in the record, but defense counsel explained he had appeared on September 20, 2007, before Judge Vlavianos, who issued the warrants after reviewing counsel's affidavit.

At the end of the day, the trial court stated it would review the transcript of Sprinkle's statement that evening, and the matter would be discussed the next day.

On February 28, 2008, after an in-chambers discussion, the trial court placed on the record its ruling: "I don't think there is one word of this statement that's admissible, Mr. [Defense Attorney]. I don't know what theory you were thinking about, but he denies any involvement with this homicide. . . . It's not under oath, it's just irrelevant." After some colloquy, the court stated: "There is no declaration against his interest, which is the only theory that's admissible for. I allowed the testimony of a few people about his Bronco and about his name. That already came out. This thing is not admissible under any theory as an exception to hearsay." After defense counsel made another lengthy argument, the trial court repeated: "Not one word of it is admissible."

The prosecutor noted that the trial court's ruling bypassed the unavailability question. Defense counsel did not refer to that issue and counsel did not press for a ruling from the court or for a record about the prosecutor's actions in trying to get the warrant served on Sprinkle. Therefore, appellate counsel's effort to fault the *prosecutor* for not making a record of what

he did comes too late. (See *People v. Braxton* (2004) 34 Cal.4th 798, 813-814 [generally, failure to press for a ruling forfeits contention of error].)

On this record appellate counsel's claim that the prosecutor did something wrong lacks support. He was asked to notify the San Jose authorities about the bench warrants and did so. As he correctly stated, he lacked the power to force the San Jose police to do anything. Very possibly the out-of-county bench warrants--for $2,500--were viewed as a low priority, but that was not the fault of the prosecutor in this case.

Further, there was no dispute at trial that Sprinkle had vowed never to appear as a witness. Indeed, he had no natural motive to appear at a trial where he would be blamed for sodomizing and murdering a prostitute. Further, the trial court had excluded virtually all of the evidence about Sprinkle, and defendant has not challenged any evidentiary rulings on appeal.

The California Supreme Court has rejected similar claims of prosecutorial interference where the witnesses did not want to appear and where their proposed evidence was excluded: "Defendant's inability to present this evidence was not due to the witnesses' willingness or unwillingness to testify, but to the trial court's rulings *excluding* the evidence. Further, the record does not establish that before the prosecution sent the fax to Illinois, either Walford or James [potential witnesses] had been willing to testify on defendant's behalf, or, if they were, that the prosecution's actions negatively influenced

Walford or James or Dempsey in their decisions not to testify." (*People v. Harris* (2005) 37 Cal.4th 310, 344; see *People v. DePriest* (2007) 42 Cal.4th 1, 55-56.)

As stated in the facts, the jury heard testimony that Sprinkle was a parolee whose Bronco was seen the day after the murder near Wilson Way, and that his house and the Bronco were searched with no incriminating results, and the tread of his Bronco could not have made the impressions across the victim's body.

Appellate counsel provides a recitation of *additional* facts that supposedly would have been elicited had Sprinkle testified. Most of these facts were ruled inadmissible or are speculative or both.

For example, the trial court ruled that the fact a search warrant was issued based on apparent blood stains in the Bronco was inadmissible, because it was determined that the stains were not blood. Also excluded was evidence of a knife fight and prior crimes committed by Sprinkle. The trial court had tentatively ruled that Sprinkle could be asked to testify about slapping a prostitute and saying that if the police found blood in his Bronco, it was from prostitutes who were intravenous drug users. But the police *did not* find blood in his Bronco, and the fact he slapped a prostitute in the past does little, if anything, to tie him to this murder. Appellate counsel recites many other facts from Sprinkle's statement but, ultimately, that statement was excluded *in its entirety* by the trial court

because Sprinkle had made no statements against penal interest. That ruling is not challenged in the briefing on appeal and we may not presume it was incorrect. (See *People v. Mitchell* (2008) 164 Cal.App.4th 442, 467 [failure to develop argument forfeits claim]; *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573 [judgment presumed correct].) We cannot know how Sprinkle would have testified, but we cannot assume that he would have incriminated himself, absent some record of *admissible* incriminating statements he may have made.

Appellate counsel also cites to evidence tendered in support of the new trial motion. But that motion was denied, and because defendant does not argue that ruling was incorrect, the evidence may not be considered on appeal. (See *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 291.) Further, the two witnesses who testified at the new trial hearing--both of whom had convictions reflecting moral turpitude--would not have been available, had Sprinkle testified: One did not learn about the case until reading about the guilty verdict in the newspaper, and the defense investigator did not learn the whereabouts of the second until the first contacted him, again, *after* the trial was over.

Finally, appellate counsel claims there were "cracks and fissures in the proof of [defendant's] guilt that might well have caused the jury to reach a different verdict had Sprinkle testified." In reality, the People's case was very strong and the third party claim was very weak. *Defendant's* DNA was found

in the victim's rectum, not Sprinkle's, and *defendant's* Blazer had tread marks consistent with the murderer's vehicle, not Sprinkle's Bronco. That the People's case was not perfect does not mean it was not solid.

II. Prior Prison Term Enhancement

When a defendant pleads guilty, or the procedural circumstances are "tantamount" to a guilty plea, the defendant should be advised of and waive the *Boykin-Tahl* rights (*Boykin v. Alabama* (1969) 395 U.S. 238 [23 L.Ed.2d 274]; *In re Tahl* (1969) 1 Cal.3d 122), the right to a jury trial, the privilege against self-incrimination, and the right to confront witnesses. (See *People v. Adams* (1993) 6 Cal.4th 570, 575-576 (*Adams*); *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 604-606; *In re Yurko* (1974) 10 Cal.3d 857 [prior conviction allegations].) "Ideally, a defendant admits a prior conviction only after receiving, and expressly waiving, standard advisements of the rights to a trial, to remain silent, and to confront adverse witnesses." (*People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 3 (*Mosby*).)

Defendant contends the trial court erred by imposing an additional year in prison based on the prior prison term enhancement, absent *Boykin-Tahl* waivers. The People contend defendant forfeited his claim, no advisement of rights was required, and any error was harmless. On this record, we accept defendant's contention of error.

The prior prison term enhancement was not initially bifurcated. After the People rested, the parties discussed

evidentiary stipulations, including a stipulation regarding the enhancement. On the record, defense counsel stated, "We are going to bifurcate but we are going to stipulate to the prior." The stated purpose of reading the stipulation to the jury was to explain that the conviction that led to the inclusion of defendant's DNA into the statewide database was for a nonviolent offense.

The written stipulation states that defendant "was previously convicted of P[enal] C[ode section] 496[, subdivision] (a), Receiving Known Stolen Property, a felony, on January 25, 1999[,] in San Joaquin County, case [No.] SC63781A and served a 16[-]month prison term therefor. Further, defendant did not remain free of prison custody for [five] years at the time of his arrest for the current offense." This was signed by the prosecutor and defense counsel, but not defendant, and was read to the jury.

The trial court did not advise defendant of any of his constitutional rights before accepting the stipulation, and the jury was not asked to return any finding on the enhancement.

The probation report mentions a prior prison term as an aggravating fact, but does not mention the prison term *enhancement*, only the knife enhancement. This is no doubt because neither the jury nor the trial court had made any finding on that enhancement prior to sentencing.

At sentencing, both the prosecutor and defense counsel submitted on the probation report.

After sentencing defendant on the murder charge and the knife enhancement, the trial court imposed an additional year in prison for the prior prison term enhancement, as follows: "The defendant also stipulated to a prior felony conviction within the meaning of [Penal Code section] 667.5. The defendant is going to be sentenced to state prison for one year consecutive."

On appeal, defendant faults the use of his stipulation for sentencing purposes, absent *Boykin-Tahl* compliance.

The People first reply that defendant forfeited this claim because it was not made in the trial court, citing *People v. Maxey* (1985) 172 Cal.App.3d 661. That case involved whether a prior conviction could be used for impeachment, and held that because Maxey did not contest the fact that his prior conviction was theft-related in the trial court, he could not do so on appeal. (*Id.* at pp. 667-668.)

In this case, defendant is challenging the procedures used to sustain a sentencing enhancement. The California Supreme Court has held that in such cases the record should reflect certain advisements and waivers and, if it does not, the error will be deemed harmless only if the record shows the plea was voluntary and intelligent. (*Adams*, *supra*, 6 Cal.4th at pp. 575-576.) The People do not cite any authority for the proposition that the failure to object forfeits a *Boykin-Tahl* claim.

The People next contend that the stipulation was not subject to the *Boykin-Tahl* rule because defendant did not admit all facts necessary to impose the prison term enhancement. The

California Supreme Court has held: "When a defendant who has asserted and received his right to trial, and has waived none of his constitutional rights, elects to stipulate to one or more, but not all, of the evidentiary facts necessary to a conviction of an offense or to imposition of additional punishment on finding that an enhancement allegation is true, the concerns which prompted the *Boykin* holding are not present." (*Adams*, *supra*, 6 Cal.4th at p. 581.) However, where a stipulation *does* encompass all elements of a charge or enhancement, it is tantamount to a guilty plea and *Boykin-Tahl* applies. (*People v. Little* (2004) 115 Cal.App.4th 766, 776-778 (*Little*); cf. *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 746-747 [*Boykin-Tahl* not applicable; stipulation did not include mental state].)

A prison term enhancement under Penal Code section 667.5, subdivision (b) "requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*People v. Tenner* (1993) 6 Cal.4th 559, 563.)

The People argue that defendant "expressly stipulated to three of the four elements, leaving only the issue of whether he had completed the prior term of imprisonment. As a result, under *Adams*, the court had no obligation to advise him of his *Boykin-Tahl* rights." We disagree.

The stipulation stated defendant "served a 16[-]month prison term." The only rational way to interpret this is to conclude that defendant *completed* his prison term; that is, he did not escape before the term was completed and he was not still serving time against the term, he *served* it. Therefore, we reject the People's view that defendant's stipulation was to less than all elements of the enhancement.

Finally, without citation to authority or discussion of the appropriate standard of harmless error, the People contend any error was harmless. We disagree.

The California Supreme Court has held that unless the transcript shows the usual waivers, "the reviewing court must examine the record of 'the entire proceeding' to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances." (*Mosby*, *supra*, 33 Cal.4th at p. 361.)

Mosby discussed cases that had applied the totality of the circumstances test, including "silent record" cases, where *no Boykin-Tahl* waivers appeared on the record. (*Mosby*, *supra*, 33 Cal.4th at pp. 361-362.) In one such case, *People v. Johnson* (1993) 15 Cal.App.4th 169, after the jury found Johnson guilty, the trial court took Johnson's admission of two prior convictions and a prior prison term without *any* admonishments. (*Id.* at p. 177.) On appeal, the court observed that Johnson was aware of his *Boykin-Tahl* rights, because he had just exercised them at trial. (*Johnson*, at p. 178.) However, nothing in the

record showed that he meant to waive those rights; therefore, the record did not show such waiver was intelligent and voluntary. (*Ibid.*) *Mosby* approved *Johnson* and similar cases: "In such cases, in which the defendant was not advised of the right to have a trial on an alleged prior conviction, we cannot infer that in admitting the prior the defendant has knowingly and intelligently waived that right as well as the associated rights to silence and confrontation of witnesses." (*Mosby*, *supra*, 33 Cal.4th at p. 362.)

This is a "silent record" case because the record does not reflect any of the *Boykin-Tahl* advisements, and therefore we cannot find defendant knowingly and intelligently waived his rights. Therefore, the error compels reversal of the prior prison term enhancement. (*Mosby*, *supra*, 33 Cal.4th at p. 362; *Little*, *supra*, 115 Cal.App.4th at pp. 779-780.)

Contrary to the People's claim, although the record may show a strong factual basis for the enhancement, that does not render the *Boykin-Tahl* error harmless. (See *Little*, *supra*, 115 Cal.App.4th at p. 780.)

However, the prior prison term enhancement may be retried. (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1234; see 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 113, pp. 456-459; *id.* (2009 supp.) pp. 163-164.) We will give the People the option to retry the enhancement or accept a sentence of 26 years to life. (See *People v. Riederer* (1990)

217 Cal.App.3d 829, 837; *People v. Heffington* (1973) 32 Cal.App.3d 1, 17.)

DISPOSITION

Within 20 days of the filing of this opinion, the People may request modification of the sentence by vacating the one-year prison term enhancement. Such request shall not affect any then-pending application for rehearing. Should such request be filed, the remittitur will direct said modification, affirm the judgment as so modified, and instruct the trial court to prepare a new abstract of judgment. Otherwise, the remittitur will order vacation of the prison term enhancement and a remand for further proceedings. The judgment is otherwise affirmed.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

HULL, J.